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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5315-14T4

JAMES MONTAG,

Plaintiff-Appellant,

v.

BOROUGH OF HO-HO-KUS, STEVEN  
SHELL, individually and in his  
official capacity as Councilman  
for the Borough of Ho-Ho-Kus,

Defendants-Respondents.

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Argued April 25, 2017 – Decided August 21, 2017

Before Judges Espinosa, Suter, and Grall.

On appeal from the Superior Court of New  
Jersey, Law Division, Bergen County, Docket  
No. L-2077-13.

Charles J. Sciarra argued the cause for  
appellant (Sciarra & Catrambone, LLC,  
attorneys; Mr. Sciarra and Matthew R.  
Curran, of counsel and on the briefs).

Mary C. McDonnell argued the cause for  
respondents (Pfund McDonnell, PC, attorneys;  
David T. Pfund, of counsel; Ms. McDonnell,  
of counsel and on the brief).

PER CURIAM

Plaintiff James Montag (Montag) filed a complaint charging defendants, Borough of Ho-Ho-Kus (Borough) and Councilman Steven Shell (Shell), with violations of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. Montag contended defendants failed to reasonably accommodate his disability and terminated his employment because of it. N.J.S.A. 10:5-4.1. He appeals a July 10, 2015 order denying his motion for a spoliation inference without prejudice and a July 24, 2015 order granting defendants summary judgment on his LAD claims.

"In reviewing a grant of summary judgment, 'we apply the same standard governing the trial court—we view the evidence in the light most favorable to the non-moving party.'" Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 349-50 (2016) (quoting Qian v. Toll Bros. Inc., 223 N.J. 124, 134-35 (2015)). When the evidence and "all legitimate inferences therefrom favoring the non-moving party, would require submission of [a plaintiff's claims] to the trier of fact," the defendants are not entitled to summary judgment. Id. at 366-67 (quoting R. 4:46-2(c)). To prevail, defendants must show entitlement to judgment "as a matter of law." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014).

Applying those standards without giving Montag the benefit of a spoliation inference, we conclude defendants were not entitled to summary judgment, reverse and remand for further

proceedings.<sup>1</sup> Because Montag's motion for a spoliation inference was denied without prejudice, there is no reason to address it.

I.

Consistent with the standard of review, we state the facts in the light most favorable to Montag. Montag worked for the Borough for nineteen years before the Borough terminated his employment in 2012. He started in 1993 as a repairman/laborer in the Department of Public Works (DPW) and subsequently served as a mechanic, foreman and assistant superintendent. In April 2010, the Borough separated responsibility for roads, building and grounds and responsibility for water and sewer. Thereafter, Montag served as the superintendent of the Borough's Water and Sewer Department (WSD). Montag's co-worker, Jeffrey Plattman, was assigned equivalent responsibility for roads, buildings and grounds.

Montag reported directly to Donald Cirulli, the Borough's Business Administrator and Human Resources Director. Defendant Councilman Steven Shell, who took office in January 2012 and served as Commissioner of WSD and Assistant Commissioner of DPW, was the Council's liaison with those departments.

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<sup>1</sup> The record was adequate to withstand defendants' motion for summary judgment without affording Montag an inference based on deleted e-mails.

According to Shell, Montag and Plattman accomplished their work with six or seven employees who reported to both superintendents, and all of them "pitched in to help each other." Shell had no problems with Montag's work and was not aware of any complaints about his abilities, performance or professionalism. Shell recalled Montag doing well when explaining the importance of water conservation to members of the Council and public. Similarly, Cirulli was not dissatisfied with Montag's performance.

The circumstances leading to Montag's termination and this litigation involve Montag's obligation to report to State and local officials. The Borough's water system consists of wells from which the Borough pumps, tests, treats and distributes water, and its sewer system collects and transports wastewater for treatment elsewhere. These systems for "wastewater collection," "water supply" and "water treatment" are subject to the "Water Supply and Wastewater Operators' Licensing Act" (the Act), N.J.S.A. 58:11-64 to -73, and implementing regulations, N.J.A.C. 7:10A, which the Commissioner of the Department of Environmental Protection (DEP) administers and enforces. N.J.S.A. 58:11-65 (defining the terms), -66 to -69 (classification of the systems and corresponding licenses), -70

(license suspension and revocation), -71 (violations, injunctive relief and penalties).

"Every system" covered by the Act must "be operated and maintained by at least one licensed operator." N.J.S.A. 58:11-66(a) (emphasis added). DEP regulations provide criteria for classifying the systems, 1 to 4, and the corresponding licenses. N.J.A.C. 7:10A-1.14. The Borough's systems require a W-2 license for the water supply system, a T-2 license for water treatment and a C-2 license for the wastewater collection system. See N.J.A.C. 7:10A-1.10(a)(2)-(4).

Montag had all three licenses by early 2000, and he first served as the Borough's "licensed operator" in May 2010. Prior to that, Montag was available to back-up the licensed operator.

Under the Act, the "licensed operator" is individually responsible for the systems. The Act defines a "licensed operator" as "a licensee approved by [DEP] . . . who is actively involved in and responsible for the operation, maintenance, and effectiveness of the system . . . ." N.J.S.A. 58:11-65(c) (emphasis added). And, the regulation provides that the "licensed operator shall be in charge of the operation of the system." N.J.A.C. 7:10A-1.10(b).

A licensed operator who violates the Act or regulations is subject to license suspension or revocation and monetary

penalties. N.J.S.A. 58:11-70 to -71. Through the regulations, the owner of the system, in this case the Borough, is also subject to sanctions.

DEP regulations establish the "minimum" duties of licensed operators. For example, licensed operators must "immediately report any system deficiencies, breaks, breakdowns, problems, bypasses, pump failures, occurrences, emergencies, [and] complaints," to the system's "owner," the Borough in this case. N.J.A.C. 7:10A-1.12(b); see N.J.A.C. 7:10A-1.2 (defining owner to include a municipality that controls a system). In addition, the licensed operator must monitor system components and collect, or oversee collection of, samples and tests of those samples. N.J.A.C. 7:10A-1.12. DEP employees conduct regular and unannounced inspections of the systems components and records to ensure compliance, and one of the licensed operator's duties is to assist the system-owner's compliance.

The regulations stress the need for the availability of a licensed operator. N.J.A.C. 7:10A-1.10(f) provides:

Any time the licensed operator is unavailable to cover the system for which he or she is the licensed operator, the owner shall obtain the services of a licensee holding a license not more than one class lower than the classification required for the operation of the system to cover the system during the unavailability of the licensed operator.

In Montag's view, he was required to be available "24/7." John Zuzeck was the Environmental Specialist Inspector employed by DEP to oversee several systems, including the Borough's systems. In that capacity, Zuzeck oversaw Montag's work and was deposed in connection with this litigation.

According to Zuzeck, the Borough did not have an employee qualified to cover when Montag was unavailable. His co-worker, Plattman, had only one of the three licenses required to fill-in, a W-1. Zuzeck acknowledged, however, that DEP would accept Plattman as substitute but only on a short-term basis. Zuzeck also indicated the issue of extended leaves had arisen several times during his ten years' service in various municipalities, and he explained that the owners of those systems obtained coverage by qualified substitutes.

In addition to requiring substitutes, the regulations demonstrate the importance of having a licensed operator available at all times by requiring two weeks' advance notice of a licensed operator's withdrawal of his or her services as licensed operator. In pertinent part, N.J.A.C. 7:10A-1.10 provides:

- (i) Licensed operators shall notify [DEP's] Examination and Licensing Unit at least two weeks prior to changing their positions or employment.

(j) The owner of a system employing a new licensed operator shall notify, in writing, the Examination and Licensing Unit of the name of the new licensed operator within two weeks after the licensed operator begins his or her employment.

Zuzeck did not recall directing the Borough to make arrangements for coverage in advance to anticipate an event requiring prolonged absence of the licensed operator. Cirulli, however, admitted DEP had "suggested that it would be good to have a backup" but indicated it was not "absolutely necessary." According to Montag, DEP was "after the Borough" to have back-up. Prior to Montag's appointment as "licensed operator," the Borough had at least one employee qualified to substitute in the event of an extended leave.

In any event, the Borough did not have any arrangement for coverage in place when Montag took ill in the summer of 2012. On July 20, 2012, Montag had a CAT scan that revealed an incisional hernia. Thereafter, Montag wore a midsection brace to work. He and Cirulli had several casual conversations about his health. Cirulli acknowledged that before making a formal request for extended leave, Montag mentioned having "a hernia [that] was causing him some discomfort" and his likely need for at least six weeks off.



On either August 27 or 31, Montag went to Cirulli's office and told him his pain had increased to the point that he could barely stand up, and he had to take care of the hernia and would need at least six weeks to recover. Montag, who had been diagnosed with a chronic disease about twelve years earlier, also told Cirulli recent blood work showed signs of liver failure.

By Montag's account Cirulli responded by asking, "Well, how can we get you out of here now?" Montag asked Cirulli what he meant, and Cirulli mentioned buying up Montag's sick and vacation time and getting someone else to do Montag's job. Montag told Cirulli he was there to discuss his need for medical leave for at least eight weeks, and possibly longer, if he had other problems to address.

Cirulli, who commonly discussed medical conditions with employees in his role as director of human services, acknowledged Montag told him about "imminent surgery" and possible liver problems, but he said Montag left everything up in the air.

Cirulli admitted telling Montag the leave he sought seemed long for hernia surgery and telling Montag he knew people who "were back to work in two or three weeks" after such surgery. According to Cirulli, Montag also indicated he might not come

back but his information was too vague to allow Cirulli to "operate," presumably meaning to do his job. Cirulli also claimed to have told Montag he was sorry he had a problem when Montag mentioned liver problems.

Cirulli said if he "knew [Montag] would be out for a great length of time, especially recovering from surgery, [he] would have to make other arrangements and get somebody in to cover him." He further admitted telling Montag it could be the end of his career and asking Montag how he could assist "in effectuating that." Cirulli elaborated on his contribution to that dialog:

[I]f you think you're not going to come back let me know now and we can work something out whereby you could be paid for any of your unused vacation days now and then we'll be clear to move ahead and do whatever we have to do in the way of hiring someone new or making an interlocal agreement with another town.

There was no question that Montag had sufficient accrued vacation and sick time to cover leave until the end of the year. And, Cirulli acknowledged he understood that Montag had responsibilities to DEP that he would have to meet even if on sick leave and that DEP could hold him accountable for violations that took place while he was on sick leave. He indicated that he thought Montag could do that without being on

site, but he recognized that Montag could not phone in his signature.

Between August 27 and 31, Montag took action to give DEP notice of his inability to serve as the Borough's licensed operator. On August 27, he prepared a "Licensed Operator in Charge Employment Notification Form," which in his view was in compliance with the requirement for two weeks' notice. He completed a section of the form stating, "This is a notification that on 8/31/12 I shall no longer be the operator in charge at [the Borough's water facility]." (Emphasis added). The portion of the form reserved "For Office Use Only" states, "This request has been processed and the record updated accordingly," and further states the notice was recorded on September 10, 2012, a date fourteen days after August 27.

Montag mailed the form to DEP on August 28 and faxed it to Zuzeck on August 31. On the fax's cover-sheet Montag explained, "Limits set upon me do not allow me to do job as I feel is required."<sup>2</sup> At his subsequent disciplinary hearing, Montag

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<sup>2</sup> This was not the first time Montag raised concerns about limitations on his ability to perform. In January 2012, he wrote and advised the Borough limitations placed on him did not permit proper performance of his duties as licensed operator. There is evidence indicating that, in January, Montag was asking for a coverage arrangement or an increase in pay to compensate him for being on a call 24/7. The Borough suggested that

testified he thought he was giving DEP notice that he would not serve as the Borough's licensed operator from a date two weeks from August 31, 2012, not on August 31. He stated, "I sent in a . . . two-week notice to take effect on" August 31, and "the same day my notice was taking effect [Cirulli was told] I would be on medical leave. I had no other choice at that point in time." (Emphasis added).

After his meeting with Cirulli on August 31, Montag faxed the form to Zuzeck and e-mailed Shell. In his 9:59 a.m. e-mail to Shell, Montag advised: "I informed [D]on that I will be out the rest of the year to correct medical problems. Pain has increased to make work very hard. Do not have timetable yet but will keep you informed." Shell responded to Montag at 2:46 p.m., copy to Don Cirulli, and wrote:

Thanks for the heads up Jimmy.

Please ensure you formally communicate this via e:mail [sic] or letter with particulars on dates you can expect to be out, starting when, etc. We'll need to be sure we have sufficient supervisory coverage of our water and sewers department and are meeting our regulatory obligations. I'll work with Don and Mayor Randall on this as soon as we know the specific date you inform us that you will depart on leave.

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Montag's desire to be paid as much as the chief of police motivated his withdrawal as "licensed operator." At best, evidence of this prior incident raised a factual dispute for the jury to resolve.

Also, please let Don know how we should record your leave i.e. sick time, vacation, etc. so we have that right.

Best of luck in addressing your medical issues. Get well.

Cirulli responded, without copy to Montag, "Thanks, Steve. Don." If Cirulli told Shell he had met with Montag and alerted Shell to the problem, it was not by way of e-mail included in this record.

Montag proceeded to act in a manner consistent with his understanding that his responsibility as the Borough's licensed operator would end fourteen days after August 31. Montag took a sick day on September 4, the day after Labor Day, and later called in to tell his secretary he had an appointment with his surgeon that Friday, September 7.

Meanwhile, Zuzeck had gone to the Borough about Montag's fax on September 4. When he arrived, a meeting concerning Montag was underway, but the participants told Zuzeck they did not know about Montag's fax withdrawing as the Borough's licensed operator. Zuzeck advised the participants Plattman could fill in for Montag temporarily with his W-1 license while the Borough looked for someone else to fill in who had a T-2 license. Even though the participants claimed ignorance of Montag's notice to DEP, they were already working on an

agreement with another municipality for the services of a licensed operator services when Zuzeck arrived.

Zuzeck did not direct the Borough to shut its systems down for lack of a licensed operator, which he later said DEP would never do. Nor did Zuzeck file a violation against the Borough or Montag. Montag's licenses remained in full force.

On Wednesday, September 5, Montag went to work to do tests DEP expected the next week. He let Plattman know he was going to get everything done before he left.

On September 6, Zuzeck went to Montag's house and spoke to him. Montag appeared tired and depressed, and he asked Zuzeck if he was there to arrest him. To Zuzeck, Montag's question was "out of character" for Montag, who had always been "proactive in trying to look for guidance to operate the system correctly and maintain it correctly." Zuzeck acknowledged that Montag could not do his job while in the condition he observed on September 6. In all his years' of working with Montag, Zuzeck never saw any reason for concern about Montag doing something to harm the Borough's systems.

On September 6, Montag spoke to the mayor by telephone and agreed to meet on September 7 at 8:30 a.m., even though he had an appointment with his surgeon at 10:30 a.m. Montag arrived for the meeting before Shell, and when Shell arrived he asked

Montag where his "Borough vehicle" was. Montag explained he came in his own truck, and Shell passed this comment – "get used to the future."

Montag was asked about his condition and timeframe, but Montag "did not know exactly what medical issues [he was facing] and how serious they were." In his view at that time before his appointment with the surgeon and liver doctor, his condition "could be as serious as the end of life for [him]."

Montag told the officials he would be happy to keep them informed but "could not in good conscience be licensed operator in charge if [he] was not [there] to oversee the system." He further explained he would change his mind if there were "a licensed backup operator." Montag was told he had "lost any opportunity to be in charge of [the Borough's] system ever again," and that ended the conversation.

Montag kept his appointment with the surgeon and was given a September 20 date for his surgery and dates for follow-up with his general practitioner and testing by a liver doctor. He returned to the Borough's office after the appointment and gave Cirulli the information the doctor had written down for him, which Cirulli copied and returned. Montag saw Shell as he was leaving Cirulli. Shell made another comment – "that's the last note you'll ever need."

Despite Shell's remark, Montag continued to work part-time to complete testing DEP required. Montag explained his notice to DEP did not put the Borough out of compliance with its obligations under the Act and would not put them out of compliance unless they refused to appoint another licensed operator. According to Zuzeck, by September 13, 2012, the Borough had a fully licensed operator to replace Montag subject to DEP's approval, which was granted.

Moreover, despite the Borough's solving the problem of coverage, on September 18, two days before Montag's scheduled surgery, the chief of police went to his home and delivered an "Immediate Suspension Notice" and a "Preliminary Notice of Disciplinary Action," specifically notice of the Borough's intention to terminate his employment.

The Borough's notice alleged Montag filed paperwork relinquishing his position as operator in charge and was, therefore, unable to fulfill "and purposefully refused to fulfill and maintain, those qualifications for the position of the Superintendent of the [WSD]." The Borough further alleged that Montag failed to give the Borough prior notice of his action. Montag admitted he had not told anyone that he was sending the form to DEP but had said he would be unavailable.

The notice advised Montag could request a hearing, which



would be held on October 3, 2012, a date the Borough then knew was within two weeks of his scheduled surgery. At Montag's request, the hearing was postponed until December. Cirulli and Montag were the only witnesses.

The disciplinary hearing was conducted by a "Special Hearing Committee," which included three members of the Borough's Council – Shell, Weiss and Lennon. The Council adopted the Special Committee's recommendation to terminate on December 18, 2012, and this litigation followed.

## II.

The LAD "prohibit[s] any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1. The LAD defines disability to include a "physical disability [or] infirmity . . . caused by bodily injury . . . or illness . . . ." N.J.S.A. 10:5-5(q).

Montag could prove a discriminatory discharge case based on direct evidence by showing the Borough "placed substantial reliance on a proscribed discriminatory factor in making its decision" to terminate him. Smith v. Millville Rescue Squad, 225 N.J. 373, 394 (2016). In this case, the discriminatory

factor was Montag's actual or perceived disability – his need to take time to recover from hernia surgery and to identify and address a suspected liver problem.

"Direct evidence of discrimination may include evidence 'of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.'" Id. at 394 (quoting Fleming v. Corr. Healthcare Sols., Inc., 164 N.J. 90, 101 (2000)). That evidence must demonstrate "not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Ibid. (quoting Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999)). To defeat that showing, the Borough would then be required to "produce evidence sufficient to show that it would have made the same decision if illegal bias had played no role in the employment decision." Id. at 395 (quoting Fleming, supra, 164 N.J. at 100). That would be difficult to prove given Cirulli's admission that he suggested Montag resign and accept the value of his accrued sick and vacation leave. In the end, the Borough achieved that by terminating Montag and crediting him with his accrued time.

The Borough's ground for termination was Montag's mailing and transmitting the fax notifying DEP of his intention to cease

service as the Borough's licensed operator without giving the Borough prior notice. Viewed in light of Montag's obligation to give DEP two weeks' notice, the Borough's failure to have a plan for covering Montag's responsibilities in the event of disabling accident or illness, and Montag's actual notice to Cirulli and Shell of his inability to serve while recovering from, as Cirulli put it, "imminent" surgery, the Borough's non-discriminatory reason for terminating this nineteen-year employee was quite slim.

A jury could reasonably find it too slim considering the Borough suffered no adverse consequence and, by terminating Montag, achieved the result Cirulli wanted – avoidance of arranging coverage by a licensed operator to accommodate Montag post-operation and during any treatment required for his then-suspected liver condition. After all, there was evidence the Borough previously retained more than one employee qualified to serve as a licensed operator.

In short, the evidence does not permit the conclusion that the Borough was entitled to a judgment on Montag's claim of direct discrimination as a matter of law.

Montag also had the option to establish discrimination on an alternative basis: circumstantial evidence of discriminatory discharge. Under New Jersey law, a plaintiff can prove a case

based on circumstantial evidence of discriminatory discharge based on disability as follows. The first step requires proof of a prima facie case – proof of 1) a disability, actual or perceived, 2) job performance meeting the employer's legitimate, reasonable expectations at the time of termination, 3) termination and 4) the employer's looking for a replacement. Grande v. Clare's Health Sys., \_\_ N.J. \_\_, \_\_ (2017) (slip op. at 25). By presenting enough evidence to raise a jury question on each of those elements, Montag was entitled to a presumption that the Borough's action was discriminatory. Id. at 25-26.

Because the Borough's defense was a non-discriminatory reason for terminating Montag, "the burden of production -- not the burden of proof or persuasion -- shift[ed] to the employer" to raise a legitimate reason for terminating Montag. Ibid. (quoting Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 382 (1988)). Because the Borough did that, Montag had to prove the Borough's reason was false, a pretext for discrimination. See *ibid.*

We conclude Montag raised a jury question on pretext. From his testimony and evidence of his continued effort to meet DEP testing deadlines, a reasonable jury could find Montag believed he gave DEP notice of withdrawal to take effect fourteen days later than August 27 or 31. Thus, he had not withdrawn as

licensed operator without giving the Borough prior notice. He had several days to alert the Borough or withdraw his notice. Accordingly, the Borough was not entitled to summary judgment on a claim of discriminatory termination based on circumstantial evidence.

Finally, we cannot conclude that the Borough was entitled to summary judgment on Montag's claim of failure to accommodate. The Borough did not even consider the accommodation implicit in Montag's dialog with Cirulli, which was coverage that would allow him to take essential sick leave without concern for violating his obligations as the licensed operator. A jury could infer that accommodation was reasonable based on the Borough's conduct in arranging such coverage in the past.

Moreover, to the extent the Borough's legitimate reason was based on Montag's failure to provide adequate information about the leave he would need, a jury believing Montag's account could reasonably reject that claim as pretext. At that point in time, Montag did not have a date for the operation and did not know whether his ominous blood results suggesting liver failure would prove fatal, which Montag believed was a real possibility.

The Borough was not entitled to summary judgment on Montag's claim of failure to accommodate.

Reversed and remanded.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

